

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION
OPIATE LITIGATION**

THIS DOCUMENT RELATES TO:

All Cases

**MDL No. 2804
Case No. 17-md-2804
Judge Dan Aaron Polster**

**PHARMACY DEFENDANTS’ MOTION REGARDING THE HUNDREDS OF MDL
CASES WHERE PHARMACY DEFENDANTS’ MARKET SHARE IS ZERO**

Last week, the “Track 3” Pharmacy Defendants¹ and the Plaintiffs’ Executive Committee (“PEC”) complied with the Court’s order directing them to identify five additional bellwether cases to proceed to trial. ECF Doc. No. 3649 (“Order”).² In advance of the parties’ submissions, each side exchanged their proposed bellwether cases. Pharmacy Defendants are named as defendants in hundreds of cases where they lack any market share according to ARCOS data. Therefore, they proposed to include one such case—*Big Stone County, Minnesota v. Teva Pharmaceuticals USA, Inc. et al.*, MDL Case No. 1:20-op-45102—as a representative bellwether.

Rather than allowing the Court to assess whether *Big Stone County* fairly represented the significant number of cases in which political subdivisions have sued one or more Pharmacy Defendants in places where those defendants do no business, plaintiffs instead voluntarily

¹ The four “Pharmacy Defendants” are CVS Pharmacy, Inc. and its subsidiaries (“CVS”), Rite Aid Hdqtrs. Corp., Rite Aid of Maryland Inc. d/b/a Mid-Atlantic Customer Support Center, Rite Aid of Ohio, Inc., and Eckerd Corp. (“Rite Aid”), Walgreens Boots Alliance, Inc., Walgreen Co., and Walgreen Eastern Co. (“Walgreens”), and Walmart Inc. (“Walmart”).

² Although Pharmacy Defendants complied with the Order and submitted their proposed bellwether cases, they maintained their objections to the Order made at the status conference and in their reconsideration motion. *See* ECF Doc. No. 3674 at 1-2. The Court has since denied that motion. *See* ECF Doc. No. 3677. Pharmacy Defendants submit this motion without waiving any of their prior objections.

dismissed Pharmacy Defendants from that case. *Big Stone Cty., Minnesota v. Teva Pharmaceuticals USA, Inc. et al.*, Case No. 1:20-op-45102, ECF Doc. No. 7 (N.D. Ohio Mar. 30, 2021). In its bellwether case submission, the PEC reassured the Court that, “[w]hen the case was brought to the PEC’s attention, the named pharmacies were dismissed.” ECF Doc. No. 3672 at 3.

The PEC claims the selection of *Big Stone County* was “puzzling” because its data “indicate[s] zero market share for any of the chain pharmacies.” *Id.* In reality, there was nothing even slightly puzzling about Pharmacy Defendants’ selecting a case that was representative of *hundreds* of cases just like it that are pending in this MDL. For example: Rite Aid estimates that it is party to over **500** cases where it has zero market share;³ Walgreens estimates that it is party to over **300** cases where it has zero market share,⁴ and Walmart estimates that it is party to over **200** cases where it has zero market share;⁵ CVS too has been named in a number of suits where it has zero market share. In North Dakota alone, for example, CVS estimates there are at least 25 cases brought by counties or cities that fit that description.⁶ The only things “puzzling” about *Big Stone County* and its ilk, then, is why Plaintiffs brought the cases at all, and why the PEC has done nothing to implement this Court’s case management order directing the PEC to amend their complaints to “not only add, *but also remove* defendants based on Plaintiffs’ analysis of the ARCOS data.” ECF Doc. No. 1429 at 2 (emphasis added).

³ See Exhibit A, Preliminary List of 507 MDL Cases Naming Rite Aid in Jurisdictions Where Rite Aid Had No Pharmacies.

⁴ See Exhibit B, Preliminary List of 301 MDL Cases Naming Walgreens Despite Zero Market Share in ARCOS Data.

⁵ See Exhibit C, Preliminary List of 224 MDL Cases Naming Walmart Despite Zero Market Share in ARCOS Data.

⁶ Should the Court agree that the PEC should dismiss these claims as it did in the *Big Stone County* case, CVS and the other pharmacy defendants will provide a list of all the cases where their analyses indicate that they have zero market share in that jurisdiction.

The Court should not permit the PEC to game the bellwether selection process and ignore the Court's case management order. In light of the PEC's concession that it never actually intended to pursue cases where a Pharmacy Defendant has zero market share, this Court should either **(1)** order the PEC to dismiss any Pharmacy Defendant from a case where its market share is zero, as the PEC did with *Big Stone County*, or **(2)** select Pharmacy Defendants' proposed replacement bellwether case *Pembina County, North Dakota v. Purdue Pharma L.P., et al.*, MDL Case No. 1:19-op-45674, as a bellwether case representative of hundreds of pending cases.

Dated: April 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing document was served via the Court's ECF system to all counsel of record on April 5, 2021.

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